LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 18 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 195.

JAMES RUTKIN,

Petitioner,

vs:

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

EDWARD HALLÉ,
Counsel for James Rutkin, Petitioner,
125 Broadway,
New York City, N. Y.

INDEX.

	PAGE
POINT I—The charge of the trial court did not properly present to the jury the elements of the crime charged in the indictment	1
POINT II—The defendant should not be convicted for willfully evading the payment of tax on income which did not become taxable until the decision in this case	8
POINT III—The Court's charge was prejudical to the Defendant, argumentative, and one sided	9
CONCLUSION	11
CERTIFICATE OF COUNSEL	12

CITATIONS.

Cases:

	PAGE
Commissioner v. *Wilcox*, 327 U. S. 404 (1945)	8
Commonwealth v. *Coolidge*, 128 Mass. 55 (1879)	7
Jones v. *United States*, 164 F. 2d 398, 399 (5 Cir., 1947)	6
Kirby v. *State*, 57 N. J. L. 320, 31 Atl. 213 (St. Ct., 1894)	7
Quercia v. *United States*, 289 U. S. 446 (1932)	5
Spies v. *United States*, 317 U. S. 492 (1942)	3, 6
State v. *Rick*, 108 Miss. 7, 66 So. 281 (1914)	7
United States v. *Balodimas*, 177 F. 2d 485 (7 Cir., 1949)	8
United States v. *Murdock*, 290 U. S. 392, 396 (1933)	9
United States v. *Raub*, 177 F. 2d 312 (7 Cir., 1949)	8

Statutes:

Internal Revenue Code, Section 145 (26 U. S. C. 1946 ed., Sec. 145)	1, 3
18 U. S. C. Section 1951 (b) (2)	7
New Jersey Revised Statutes 2:127-1, 2, 3 and 4	7
2A: 105-1, 2, 3 and 4	7

Other Authorities:

1. Burdick, Law of Crimes, 404	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 195.

JAMES RUTKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

Your petitioner, through his counsel, respectfully requests a rehearing for the following reasons:

POINT I.

The charge of the trial court did not properly present to the jury the elements of the crime charged in the indictment.

The indictment herein contained a single count charging Rutkin with willfully and knowingly attempting to defeat and evade a large part of his income tax for the year 1943 in violation of Title 26, U. S. Code, Section 145b (R. 5). Throughout the trial it was conceded that Rutkin received $250,000.00 in 1943. It was also conceded that if defendant received money as payment for his interest in Browne-

Vintners he was under no obligation to report it in his return or pay taxes thereon since the tax had been paid. This being the case, the jury had to find, first, that Rutkin had no claim or semblance of claim whatsoever to the proceeds of sale of Browne-Vintners, and second, that having obtained $250,000.00 by holding up Reinfeld with a gun, he willfully and knowingly attempted to defeat payment of the tax.

Throughout the trial all witnesses except Reinfeld and Holtz stated that Rutkin at all times asserted that he had a bona fide claim to the $250,000.00. In fact, the United States Court of Appeals for the Third Circuit based its conclusion on the supposition that there was a claim of right by Rutkin to some part of the proceeds of sale of Browne-Vintners. Only Reinfeld and Holtz testified that Rutkin made threats. Thus from all the evidence in the case the jury could have found any of the following:

1. That Rutkin had no interest in Browne-Vintners, knew he had none, held Reinfeld up with a gun five months before the payment was made (R. 41), and placed the proceeds of the holdup in a safe deposit box in order to avoid taxation.

2. That Rutkin had no interest in Browne-Vintners, but had an honest belief that he had an interest, enforced that belief with a gun and placed the proceeds in a safe deposit box believing that the taxes had been paid thereon.

3. That Rutkin had an interest in Browne-Vintners, had collected his share with the aid of a gun, and had placed the proceeds in a safe deposit box, believing that taxes had been paid thereon.

4. That Rutkin received his share of the proceeds of the sale of Browne-Vintners rightfully, without any threats, and had placed the proceeds in a safe deposit box believing that the taxes had been paid thereon.

5. That Rutkin obtained the money by threats, knew he was not entitled to it, but did not believe it was taxable.

The statute under which Rutkin was indicted would permit conviction only if the jury found the facts to be as set forth in the first hypothesis. *Spies* v. *United States*, 317 U. S. 492 (1942). Section 145 b of the Internal Revenue Code, 26 U. S. C. 1946 ed. Sec. 145, requires, first, the non-payment of tax, and second, a willful and knowing attempt to defeat and evade payment. If the jury found the facts to be as set forth in any of the hypotheses numbered 2 through 5, Rutkin was not guilty because the necessary willfulness was not present.

Did the charge properly limit the jury to the first hypothesis? Consider it in the light of some 880 pages of inflammatory testimony in which Rutkin was tried for bootlegging, extortion, gambling, prostituting justice (R. 927), supergovernment (R. 934) and scoundrelism (R. 927). In a charge covering fourteen pages of record, what did the Court say on this crucial issue in the case? Twenty-five lines (R. 922) refer to the requirement of willfulness, defining the term in generalities and by use of synonyms. Nothing in this language sufficiently restricts the jury. Later the Court deals with the question of willfulness more specifically (R. 930):

> "If that money was extorted and was paid as a result of threats, then it was taxable income and Rutkin (1465) was under the duty of reporting that tax. But as I indicated to you before, the mere failure to report it doesn't satisfy the requirements

> of the law with regard to the violation of this statute, there must be something else which will indicate the willful intent to defeat and evade the tax. You may consider other elements that appear in the evidence, the fact that this money was paid over in cash; that no record of any kind was made of the receipt of that money; that the money was split and $100,000 of it sent to the sister-in-law of the defendant to be placed in her vault or "wault" as it has been called here, and that the other $150,000 was placed in the defendant's own vault. You may consider these as factors surrounding the whole transaction."

Does this part of the charge properly restrict the jury? In the light of the evidence it would allow the jury to return a guilty verdict based on hypotheses 2, 3 and 5 as well as hypothesis 1.

Furthermore, pointing to the "other elements" the Court instructed that the jury could find willfulness from the fact that the money was received in cash. The undisputed testimony was to the effect that there was no request for a cash payment by any of the recipients. In fact payment by check was requested (R. 478), and the money was paid in cash because Reinfeld, the chief government witness, kept the proceeds of the sale of Browne-Vintner in a vault in Newark (R. 206). Thus the Court instructed that the Jury could find willfulness on Rutkin's part from the fact that someone else desired to transact business in cash. Nowhere in the record is there any evidence that Rutkin requested payment in cash.

Note further that the Court told the jury that no record of any kind was made of the receipt of the money (R. 930). The undisputed testimony was that a release had been signed by Zwillman, Stacher and Rutkin, and witnessed by several attorneys (R. 480, R. 967, Exhibit D-8). While the

trial Judge may analyze and dissect evidence, he may not in this fashion distort it or add to it. *Quercia* v. *United States*, 289 U. S. 446 (1932).

The charge continues as follows:

> "Rutkin says that he kept no books; kept no books at that time nor at any other time; kept no books when he received his profit, sixty, seventy, eighty thousand dollars a year, I think it was, from the bootlegging, and admits that he paid no tax; kept no books when he got this $250,000. These are all things that you may consider as circumstances surrounding the whole procedure."

This part of the charge was excepted to (R. 936), but the Court merely added that it showed a course of conduct indicating an attempt to evade the tax in question (R. 936). Was Rutkin tried for evading taxes in the bootlegging days?

Speaking of the presence of the attorneys, the Court said (R. 931):

> "The payment of $250,000 was made in the presence of other people, these people being Zwillman, as I recall it, Stacher who were there with Rutkin and the lawyers. Well, neither the lawyers nor any of these people, it seems to me, would be inclined to go out and publish it."

Thus on the vital issue of willfulness, we find the Court pointing to the fact that lawyers representing persons other than the defendant would be likely to keep quiet is a circumstance from which the jury can find that the defendant willfully attempted to evade his tax. This part of the charge was duly excepted to (R. 936).

Compare the argumentative charge of the Court with the defendant's requests to charge (Nos. 28 and 29, R. 948, R. 949) on the issue of willfulness. Had the Court charged

as requested, it would have been perfectly clear to the jury that conviction could be based only upon hypothesis No. 1. Instead, we find the judge combing the record for some slight evidence of willfulness. This, despite the fact that of the witnesses present when the agreement to pay $250,000.00 was reached, and when the money was paid, all but Louis Holtz, a relative and employee of Reinfeld, gave testimony tending to corroborate Butkin's version of the transaction. Yet the Court ignored the testimony of reputable members of the bar (Kessler and Mehler), refused to charge as requested in defendant's requests to charge numbered 22 through 27 (R. 946-948), and told the jury that Reinfeld's testimony had been corroborated (R. 930). Add to this the fact that the Court by its characterization had previously destroyed the probative value of two important corroborative defense witnesses (R. 503).

The charge was so confusing and argumentative and the testimony so inflammatory and misleading that no one can say what the jury found the facts to be. In a trial for willfully evading payment of income tax, it is of the greatest importance to a just and fair trial that the defendant be protected from prejudice arising out of other matters not germane to the trial and that his defenses be fully and fairly submitted to the jury. It is particularly important that he be tried, not for being an unworthy character, but upon specific instructions applicable to the law and the facts of the case. E.g., *Jones* v. *United States,* 164 F. 2d 398, 399 (5th Cir., 1947). What further proof do we need of confusion of issues than that this Court and the Third Circuit Court of Appeals based their conclusions on different factual hypotheses.

But conviction cannot be based on any finding except that assumed by this Court if *Spies* vs. *United States,*

supra, is still the law. Can this Court say that on this record the jury could not possibly have concluded as did the Third Circuit?

To add to the confusion the Court nowhere in its charge defines the term extortion. After setting up a clear dichotomy between money lawfully obtained and money extorted (R. 930), the Court stated that the latter was taxable, but left it to the jury to determine the exact content of the term. In New Jersey there are four crimes of extortion (R. S. 2:127-1, 2, 3 and 4; R. S. 2A:105-1, 2, 3 and 4). They range from bribe taking (R. S. 2:127-1), to sending threatening letters (R. S. 2:127-3). The federal statute defines extortion as, ". . . the obtaining property from another with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U. S. C. Section 1951 (b) (2). At common law the crime of extortion could be committed only by a public officer. *Kirby* v. *State*, 57 N. J. L. 320, 31 Atl. 213 (S. Ct. 1894). Where the crime has been enlarged by statute most states hold that it is committed even though the defendant had a bona fide claim to the money obtained by threats. E.g., *Commonwealth* v. *Coolidge*, 128 Mass. 55 (1879); *contra, State* v. *Rick*, 108 Miss. 7, 66 So. 281 (1914). Thus it is not only doubtful whether the extortion was a state or federal crime; it is even more doubtful whether the jury had the slightest notion what extortion meant. If the court meant the extortion of the New Jersey statute, then it probably charged as a matter of law, that Rutkin was guilty of willful evasion of his tax even if he had a bona fide claim to the $250,000.00. 1 Burdick, Law of Crimes, 404. At least the question has never been determined in New Jersey.

The government in its brief has made the point (page 46), that if there were errors below the defendant

did not properly except to them. The record will not support this contention. We have pointed out instances of specific exceptions to parts of the charge. It is obvious that counsel below were under the impression, before the jury retired, that they had properly excepted to the court's refusal to charge as requested (R. 939, 955). But even if the errors were not excepted to this Court can and should notice plain errors and defects affecting substantial rights. Federal Rules of Criminal Procedure, Rule 52b. Failure of the trial judge to make clear to the jury the issues involved in the trial and the essential elements of the crime was reversible error even if defendants did not except or request a correct charge. E.g., *United States* v. *Balodimas*, 177 F. 2d 485 (7 Cir. 1949); *United States* v. *Raub*, 177 F. 2d 312 (7 Cir. 1949).

POINT II.

The defendant should not be convicted for willfully evading the payment of tax on income which did not become taxable until the decision in this case.

The majority opinion of this Court assumes that petitioner had no basis for his claim to the $250,000, and goes on to decide for the first time that the proceeds of extortion constitute income taxable to the extortioner in the year in which they were received. While the Court attempts to restrict *Commissioner* v. *Wilcox*, 327 U. S. 404 (1945) to its facts, in fact that case is overruled. For the first time money obtained without any bona fide legal or equitable claim constitutes returnable income. While there may be sufficient justification for the assessment of the tax, it is quite another matter to convict a man of willfully evading payment when he could well have a reasonable doubt as to

the taxability of the money. If defendant is to be tried for a crime involving willfulness he should have an opportunity to present to the jury all the circumstances surrounding his acts or omissions, including the circumstance that he could not have foreseen the decision in this case. In *United States* vs. *Murdock*, 290 U. S. 392, 396 (1933) this Court said:

> "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until this court pronounced judgment in United States *v.* Murdock, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63, 82 A. L. R. 1376, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. The question was involved but not decided in Ballman *v.* Fagin, 200 U. S. 186, 195, 50 L. ed. 433, 437, 26 S. Ct. 212, and specifically reserved in United States *ex rel.* Vajtauer *v.* Commissioner of Immigration, 273 U. S. 103, 113, 71 L. ed. 560, 566, 47 S. Ct. 302. The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing."

The same reasoning is applicable to this case.

POINT III.

The Court's charge was prejudicial to the defendant, argumentative and one sided.

In addition to the fact that the jury was not properly instructed on the issue of willfulness, the rights of defendant were prejudiced by the last part of the charge, which contained a vast amount of inflammatory matter having noth-

ing whatsoever to do with the case. The charge (R. 933-934) reads as follows:

"But as you do that you must remember the other party to the controversy, the United States of America. Now, the United States of America is not just some far off idea or some distant concept. The United States of America is you and I and about one hundred and forty-five or one hundred and fifty million of our fellow-citizens who are banded together under law, trying to live in peace and comity with ourselves and with the rest of the world; trying desperately to make this America what so many men have suffered and died to make it; the land where justice exists; the land where honesty and decency is represented; where we have selected the government; where we won't be governed by any super-government, by any deleterious influences, but where we will be governed under our principles of freedom by the men and women that we select to govern us and that we hope will live up to the sacredness of their oath of service, although you have had a sample here where that is not quite true. But under God that is what we are aiming at. We are aiming at freedom and truth and justice.

And so the people of the United States have their rights too and those rights must be guarded just as jealously as the rights which you guard jealously for James Rutkin. The Government of the United States doesn't ask you to sacrifice anybody to prove its might. It asks you to do justice. That's all that Rutkin has a right to ask you to do, and that's what the Government of the United States asks you to do. It asks you to remember its rights too, remembering that unpunished crime, undetected crime, are threats to the majesty and dignity of our government; and that unpunished crime undermines our government. We all of us must do that which is

> our duty and do it without fear or favor. And so, keeping the balance between the two parties to this suit, the United States of America and James Rutkin, do justice between them. And I know of no better way in which to recall to you that which you must do than to recall the words of your oath, 'a true verdict to render according to the evidence, so help you God'. And if you do that, no one may quarrel with your verdict."

Petitioner was not on trial for being part of a "supergovernment", or for the commission of other "undetected" and "unpunished" crime. But the court gave the jury the option of punishing Rutkin for his bootlegging offenses, his gambling, or perhaps his almost simultaneous appearance before the Senate Crime Investigating Committee. The quoted words were not a reference to the crime of income tax evasion. That was not undetected. It had not even been hidden. Obviously, that crime had nothing to do with the underworld of bootleggers and gamblers to which the court must have been referring when it spoke of "supergovernment".

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Third Circuit Court of Appeals be reversed and a trial granted.

Respectfully submitted,

EDWARD HALLE,
Counsel for Petitioner,
225 Broadway,
New York City.

Dated: April 17, 1952.

Certificate of Counsel.

I, EDWARD HALLE, Esq., counsel for the above named petitioner, do hereby certify that the foregoing petition for the rehearing of this case is presented in good faith and not for delay.

EDWARD HALLE,
Counsel for James Rutkin, Petitioner.